No. 18-30126

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

ZERISENAY GEBREGIORGIS,

Defendant/Appellant.

ZERISENAY GEBREGIORGIS'S OPENING BRIEF

Appeal from the United States District Court
For the District of Alaska (Juneau)
The Honorable Timothy M. Burgess
Chief United States District Judge
No. 1:17-CR-03-TMB

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I. JURISDICTION

Zerisenay Gebregiorgis appeals the judgment imposed following his jury trial conviction for conspiracy to distribute heroin and methamphetamine. *See* ER 1-7.[1] The district court had jurisdiction under 18 U.S.C. § 3231. The district court announced sentence on June 1, 2018 and entered judgment on June 11, 2018, followed by an amended judgment on July 5, 2018. CR 139, 144; ER 1-7. Mr. Gebregiorgis timely appealed on June 7, 2018. ER 91-92; Fed. R. App. P. 4(b)(1)-(2). This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

II. BAIL STATUS

Mr. Gebregiorgis is serving a custodial sentence of 121 months with an estimated release date of July 4, 2025.

III. ISSUES PRESENTED

(1) Whether the government failed to prove the charged conspiracy, thus resulting in (i) insufficient evidence to convict, or in the alternative (ii) a fatal variance?

(2) Whether the district court committed reversible structural error by granting defense counsel trial continuances over Mr. Gebregiorgis's objection?

[1]"ER" refers to Mr. Gebregiorgis's Excerpts of Record; "CR" to the district court Clerk's Record; and "PSR" to the Presentence Investigation Report, which Mr. Gebregiorgis files under seal concurrently herewith.

(3) Whether the district court committed three serious errors at sentencing, including (i) punishing Mr. Gebregiorgis for standing on his right to a jury trial, (ii) relying on erroneous fact-finding, and (iii) ignoring a nonfrivolous defense argument?

(4) Whether the district court erroneously imposed seven special conditions of supervised release?

IV. STATEMENT OF THE CASE

On February 21, 2017, a federal grand jury indicted Mr. Gebregiorgis on one count of conspiracy to distribute heroin and methamphetamine. ER 385-87. On November 30, 2017, Mr. Gebregiorgis commenced a five-day jury trial. CR 100-04. On December 6, 2017, the jury returned a guilty verdict. ER 125. The jury found that Mr. Gebregiorgis's conduct of conviction involved 100 grams or more of a mixture or substance containing a detectible amount of heroin, thus triggering a statutory sentencing range of 5-40 years. *Id.*; 21 U.S.C. § 841(b)(1)(B). On June 1, 2018, the district court sentenced Mr. Gebregiorgis to 121 months in custody followed by five years of supervised release. ER 1-7. Mr. Gebregiorgis timely appealed. ER 91-92.

V. STATEMENT OF FACTS

A. A TALE OF TWO CONSPIRACIES (OR MORE).

1. BACKGROUND.

Zerisenay "Sam" Gebregiorgis is a Sudanese refugee, truck driver, and father of four from Seattle. PSR p. 2 & ¶¶ 79-80, 87-88.[2] In this case, the government accused him of leading "a drug trafficking ring to bring methamphetamine and heroin" into the Southeast Alaska communities of Ketchikan and Sitka between June 1, 2016 and August 16, 2016. ER 350, 385-87.

At trial, defense counsel conceded that the evidence reflected some connection between Mr. Gebregiorgis and drugs. *See* ER 184 ("You see, what they can show is that Sam was dealing drugs."). Counsel did, by contrast, vigorously contest that the government proved the *charged* offense: *viz.*, a single, overarching conspiracy to distribute heroin and methamphetamine during the specified time frame. *Id.* ("it's a case of multiple conspiracies, at best"). In summation, even the government agreed that its trial presentation suggested two conspiracies: a "Ketchikan conspiracy" and a "Sitka conspiracy[.]" ER 156, 165. The jury's principal task, therefore, was to decide this issue.

[2]The record also contains references to Mr. Gebregiorgis by the nickname "Bullet." *See, e.g.*, ER 312-48.

2. THE "KETCHIKAN CONSPIRACY."

As for the "Ketchikan conspiracy," the government's star witness was Jason "Crow" Simpson, a local heroin addict and drug dealer turned government informant. ER 351-52, 355-56. One witness colorfully described Simpson as a "rat piece of s**t that would . . . set up his own grandmother and put her in jail. You know, he's just a bad person." ER 310. Simpson didn't entirely disagree: he testified that he (1) had been dishonest "[a] lot[;]" (2) stole from people; (3) had been to prison; (4) lied to law enforcement—including in this investigation—(5) lied to Mr. Gebregiorgis; (6) devised a strategy to quit heroin by betraying all of his suppliers to the police; and (7) was "smart enough" to avoid "getting caught" by "redirect[ing] law enforcement" away from himself. ER 293-96, 299-303, 305-06. Simpson's police handlers held him in similar esteem. *See*, *e.g.*, ER 198-99 ("I was afraid you were going to ask that. He's not always honest."). Nonetheless, law enforcement relied on Simpson for information about his drug sources—*viz.*, "unless they [saw him] get [drugs] from a particular person, they [didn't] really know where [he] got the drugs from" except for what they learned through him. *See* ER 297.

Simpson testified that he met Mr. Gebregiorgis and began selling "his drugs" in either late May or early June 2016, and that he did not know Mr. Gebregiorgis "any other way." ER 353. According to Simpson, he and Mr.

Gebregiorgis negotiated the following basic arrangement: that Mr. Gebregiorgis would send female couriers to Ketchikan with so-called "cans" of heroin inside their vaginas; Mr. Gebregiorgis would either front the drugs or Simpson might pay up front; the couriers received a fee for their services before flying home; and Simpson took responsibility for selling the drugs. ER 353-54, 357, 278-79, 304.[3]

Simpson testified that prior to mid-July 2016, he sold only one can of heroin "for sure"—though "[m]aybe two"—for Mr. Gebregiorgis. ER 357. According to Simpson, a woman named Tiara Cato served as the drug courier, and another woman named Jonishia Price Grayson traveled with Mr. Gebregiorgis to "pick up money." ER 285, *referring to* ER 311. Neither woman testified at trial, but flight records reflected that Mr. Gebregiorgis, Cato, and Price Grayson traveled between Seattle and Ketchikan during the latter half of June 2016. ER 214. In addition, a woman named Ladetra Davis testified that in June 2016, she accompanied Mr. Gebregiorgis on (what she thought was) a romantic getaway to Ketchikan; the government argued that Mr. Gebregiorgis used Davis as "cover" for his own presence. ER 309, 159-60; *accord* ER 200 (investigating officer testifying that he had "no reason to think that [Davis] brought drugs in to Alaska").

[3]Simpson described a "can" as "the size of a pop can. It looks literally like a pop can mold. They heat it up and put it in there, and a woman can fit it, and they travel with it." ER 357. One can contained approximately six ounces. *Id.*

Simpson's claimed partnership with Mr. Gebregiorgis ended on July 13, 2016, when Simpson commenced service as a law enforcement source against Mr. Gebregiorgis. ER 355-56, 267. In that capacity, Simpson debriefed with investigators, showed them his text messages with Mr. Gebregiorgis dating back to early July 2016, and conducted a series of monitored and/or recorded phone calls with Mr. Gebregiorgis. ER 358-60, 274-75, 279-80, 282-83, 267-68, 312-48. Generally speaking, this evidence—and in particular Simpson's phone calls—reflected Simpson's ongoing efforts, through the end of July 2016, to lure Mr. Gebregiorgis back to Ketchikan with drugs. *See, e.g.*, ER 272-84.[4]

Simpson told the jury that he and Mr. Gebregiorgis "didn't deal with meth," and instead they only "dealt heroin" together. ER 299. He also testified that he had never used drugs in Sitka—let alone sold drugs there—and he could not say whether any of the drugs he sold had ever "been brought to Sitka[.]" ER 291-92; *accord* ER 298 (Simpson testifying that his text messages and phone conversations as an informant were "[a]ll designed . . . to try and get drugs into *Ketchikan*") (emphasis added). The trial record also does not disclose any contraband recovered from Ketchikan associated with Mr. Gebregiorgis.

[4]At ER 283, the transcript appears to inaccurately refer to a call dated "January 31st, 2016" rather than July.

In late July 2016, Simpson and his handlers had difficulty reaching Mr. Gebregiorgis because, as it turned out, he had been taken into custody on an unrelated matter in Washington. ER 362-63; PSR ¶¶ 70-71. Also notably, the trial evidence does not reflect purportedly conspiratorial conduct—including, *e.g.*, communications and/or travel between Seattle and Alaska—from July 13 through August 4, 2016, *i.e.*, more than three weeks at the heart of the alleged conspiracy period. *See* ER 214 (summary chart reflecting no activity other than conversations between Mr. Gebregiorgis and Simpson—by then an informant—during this time frame). Stated differently, this period of inactivity at issue constitutes nearly 30% of the charged conspiracy period.

The final chapter of the so-called "Ketchikan conspiracy" commenced on August 5, 2016, when a new courier named Shammar Ferguson traveled to Ketchikan from Seattle. ER 214. According to Simpson, Ferguson showed up unannounced at the airport and needed a ride into town; ultimately Ferguson produced a can of heroin, received $4,000 from Simpson, and left a few days later. ER 284-87. Ferguson did not disagree that she made that trip—though she disclaimed any knowledge about what she was transporting—and a text message reflects that on August 5, Mr. Gebregiorgis sent her Simpson's cell phone number. ER 203-06, 269. As a police informant, Simpson should have reported this development to his handlers, but rather than meet that obligation, he elected

instead to sell some of the heroin and use the rest to relieve his symptoms of drug withdrawal. ER 287.[5]

Simpson did, by contrast, dutifully inform the police that Mr. Gebregiorgis was scheduled to visit Ketchikan on August 13, 2016. ER 288-89, 214. On that occasion, the police acted on Simpson's tip to intercept and arrest Mr. Gebregiorgis at the Ketchikan airport, at which time they found no drugs or weapons in his possession. ER 290, 201-02.

3. THE "SITKA CONSPIRACY."

The "Sitka conspiracy" similarly involved duplicity and backstabbing at Mr. Gebregiorgis's expense.

In Sitka, the primary local actors were Lawrence "Tinker" Johnson and Evelyn "Evy" Calhoun, two drug addicts who were, at the time, romantically involved with each other. ER 222-23, 226, 232-34. Johnson was a longtime methamphetamine user who readily agreed that he is "dishonest[,]" "deceitful[,]" "manipulative[,]" and "can't be trusted[.]" ER 223, 235, 242, 245. Calhoun was also a longtime addict. ER 257. Johnson did not know Simpson, and had never heard of him; Calhoun similarly revealed that she had "never really [even] been out of Sitka." ER 240, 256.

[5]The police only learned of the August transaction, including Simpson's deceptive conduct about it, after the fact. ER 287.

The "Sitka conspiracy's" basic storyline proceeds as follows. Calhoun met Mr. Gebregiorgis in late June 2016, and based on her involvement in the local drug scene, Mr. Gebregiorgis asked her to travel "down south" with him to "mule [back] up some drugs[.]" ER 246, 251. Calhoun was on probation at the time, however—and she thus could not leave Alaska—but Mr. Gebregiorgis insisted and bought tickets for her anyway. ER 250-52. According to Calhoun, Mr. Gebregiorgis did not understand that she didn't feel "comfortable" going, "didn't want to go[,]" and "also wasn't legally allowed to go." ER 252. Accordingly, Calhoun tried to passively "phase" herself out of the situation rather than directly confront Mr. Gebregiorgis. *Id.* To that end, Calhoun traveled all the way to the Sitka airport with Mr. Gebregiorgis in a "panick[ed]" condition, at which time she pretended to check in for their flight, waited for Mr. Gebregiorgis to pass through security, and then "immediately left the airport"—thus deserting Mr. Gebregiorgis—and called Johnson for a ride. *Id.* Flight records corroborate that Calhoun had a ticket issued for a July 1, 2016 flight from Sitka to Seattle. ER 214.

Johnson also deceived Mr. Gebregiorgis. Johnson testified that he became involved with Mr. Gebregiorgis sometime in 2016, though his testimony is unclear whether it was in June, July, or August. ER 223. Based on Johnson's involvement in the local drug scene, Mr. Gebregiorgis purportedly proposed to "start bringing dope up" from Washington for Johnson to sell. ER 224.

Johnson wanted the drugs—and he agreed to receive them (ER 225)—but he had no intention of entering into a criminal conspiracy with Mr. Gebregiorgis. In fact, "during the time all of this ha[d] been going on," Johnson secretly served as a government source, and thus maintained "text" and "phone call[]" communication with a Sitka detective "about Sam . . . trying to bring dope into Sitka." ER 230; *see also* ER 237-39 ("The day I found out that Sam had come to Sitka and wanted me to go work for him, . . . I called [Detective] Ryan Silva instantly[,]" *i.e.*, as early as the beginning of June). The reason, according to Johnson, was that Calhoun was using heroin, and he "figured" that if he could "keep it out of Sitka and maybe help her get sober, . . . she'd have a better life for herself." ER 243.

Fast forward to August 12, 2016, and Ferguson arrived at the Sitka airport. ER 225, 214. Here again, Johnson did not comport himself honorably: he testified that he not only (1) declined to alert his police contact that Ferguson arrived, but also that he planned to (2) "'party off the[] drugs'" she brought rather than sell them; (3) pay Mr. Gebregiorgis nothing; and (4) ultimately hand Ferguson and Mr. Gebregiorgis over to the police. ER 230-31, 236, 240-42, 244. In legal terms, Johnson candidly agreed that he and Mr. Gebregiorgis never had a "meeting of the minds." ER 236. Calhoun similarly testified that (1) any agreement in Sitka existed only between Johnson and Mr. Gebregiorgis, as she was "out of the loop[;]" (2) all she cared about was getting high; and (3) she knew that Johnson

planned to "rip Sam off[.]" ER 257, 262-63; *accord* ER 265 (Calhoun reaffirming that she never intended to "do business with Sam").

According to Johnson, Ferguson brought heroin and methamphetamine to Sitka. ER 225. From the airport, Johnson and Calhoun brought Ferguson to the home of a man named Daniel Smith, where Ferguson "pulled out a condom between her legs of meth and heroin and handed it to" Johnson. ER 227-28. As planned, Johnson made no effort to sell the contraband, and instead he, Calhoun, Ferguson, and others partied on the drugs for either "a day and a half" or "a couple days[.]" ER 229, 264. According to Johnson, he used nearly all of the methamphetamine himself—almost an ounce—over the course of three days. ER 243. In addition, the party eventually got "a little crazy[,]" so Johnson took what remained of the heroin and buried it behind Calhoun's house "where nobody else could get anything that was left of it." ER 231-32.

On August 16, 2016, Ferguson and Johnson got in a fight at Calhoun's house, and Calhoun called the police on Ferguson. ER 253-54. When the police arrived, Johnson led them to the heroin stash buried behind the house—which contained approximately 85.9 grams of contraband—and the officers arrested all three individuals. ER 254-55, 270, 214. The police never recovered any of the alleged methamphetamine. ER 266.

Ferguson agreed with Johnson's and Calhoun's recitations of these events in most material respects (ER 207-13), and the only other evidence regarding Sitka didn't add much to the government's case. There existed, for example, documentary evidence that Cato and Price Grayson traveled to Sitka in late June 2016, but the government presented no evidence about what they did there. ER 214. The government also put Rahel Tesfay on the stand, who—like Davis—was romantically involved with Mr. Gebregiorgis. ER 216. Tesfay traveled to Sitka with Mr. Gebregiorgis in June 2016, and she believed the trip had something to do with Mr. Gebregiorgis's trucking and/or garage businesses. ER 217, 214. Tesfay further testified that she assisted Mr. Gebregiorgis with financial matters such as (a) opening a Wells Fargo account in Sitka, (b) allowing Mr. Gebregiorgis to use her bank card, and (c) accepting Western Union wires on his behalf. ER 218-20. Tesfay denied, however, having any "information about drugs[,]" and the police agreed that there was "no reason to think that she brought drugs into Southeast Alaska." ER 221, 199-200.

4. SUMMATION AND VERDICT.

As noted, Mr. Gebregiorgis argued in summation that the foregoing evidence failed to prove the conspiracy charged by the grand jury. ER 170-88. The government disagreed. ER 155-69, 188-95. After receiving, *inter alia*, a

multiple conspiracies instruction (ER 146), the jury sided with the government, and thus returned the verdict set forth above. ER 125.

VI. SUMMARY OF THE ARGUMENT

First, the government failed to prove the charged conspiracy, thus resulting in (i) insufficient evidence to convict, or in the alternative (ii) a fatal variance.

Second, the district court committed reversible structural error when it granted defense counsel trial continuances over Mr. Gebregiorgis's objection.

Third, the district court committed three serious errors at sentencing, including (i) punishing Mr. Gebregiorgis for standing on his right to a jury trial, (ii) relying on erroneous fact-finding, and (iii) ignoring a nonfrivolous defense argument.

Fourth, the district court erroneously imposed seven special conditions of supervised release in violation of Mr. Gebregiorgis's constitutional and statutory rights.

VII. ARGUMENT

A. THE GOVERNMENT FAILED TO PROVE THE CHARGED CONSPIRACY, THUS WARRANTING REVERSAL OF MR. GEBREGIORGIS'S CONVICTION.

1. PROCEDURAL BACKGROUND.

At the close of evidence, Mr. Gebregiorgis unsuccessfully moved for a judgment of acquittal. ER 55-66. After trial, Mr. Gebregiorgis filed a renewed motion for judgment of acquittal, or in the alternative for a new trial, in which he

argued, in sum, that the trial evidence proved multiple conspiracies—if anything—rather than the one the grand jury charged. ER 119-24, *citing* Fed. R. Crim. P. 29 *and* Fed. R. Crim. P. 33. The government opposed the motion (ER 110-18), and the district court denied relief (ER 46-53).

2. STANDARDS OF REVIEW.

This Court reviews *de novo* the denial of a motion for acquittal. *United States v. Bhagat*, 436 F.3d 1140, 1145 (9th Cir. 2006). "Allegations of . . . material variance are also reviewed *de novo*." *Id.* A "district court's decision to deny a motion for a new trial is reviewed for an abuse of discretion." *Id.*

3. THIS COURT SHOULD ORDER A JUDGMENT OF ACQUITTAL BECAUSE THE GOVERNMENT PRESENTED INSUFFICIENT EVIDENCE TO ESTABLISH THE CHARGED CONSPIRACY.

a. LEGAL FRAMEWORK.

"The question of whether a single conspiracy has been proved, rather than multiple conspiracies, is . . . essentially a question of the sufficiency of the evidence." *United States v. Bibbero*, 749 F.2d 581, 586 (9th Cir. 1984). That is to say, "if the indictment alleges a single conspiracy, but the evidence at trial establishes only that there were multiple unrelated conspiracies, there is insufficient evidence to support the conviction on the crime charged, and the affected conviction must be reversed." *United States v. Fernandez*, 388 F.3d 1199, 1226-27 (9th Cir. 2004). "An appellate reversal of a conviction on the basis of

insufficiency of the evidence has the same effect as a judgment of acquittal: the Double Jeopardy Clause precludes retrial." *Bibbero*, 749 F.2d at 586. "In determining the sufficiency of the evidence to support a conviction, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 586-87 (quotation marks and emphasis omitted).

At its core, "[t]he test here is whether there was one overall agreement among the various parties to perform various functions in order to carry out the objectives of the conspiracy; if so, there is a single conspiracy." *United States v. Ellsworth*, 481 F.2d 864, 869 (9th Cir. 1973). To avoid reversal, the government's "evidence must show that each [conspirator] knew, or had reason to know, that his benefits were probably dependent upon the success of the entire operation." *United States v. Duran*, 189 F.3d 1071, 1080 (9th Cir. 1999) (quotation marks and ellipsis omitted). "Typically, the inference of an overall agreement is drawn from proof of a single objective, or from proof that the key participants and the method of operation remained constant throughout the conspiracy." *Id.* (citations omitted). "The inference that a [conspirator] had reason to believe that his benefits were dependent upon the success of the entire venture may be drawn from proof that the

co-conspirators knew of each other's participation or actually benefitted from the activities of his co-conspirators." *Id.*

"In assessing whether the evidence supports the jury's finding of a single scheme, [this Court] may consider the following factors: 1) the nature of the scheme; 2) the identity of the participants; 3) the quality, frequency and duration of each conspirator's transactions; and 4) the commonality of time and goals." *United States v. Morse*, 785 F.2d 771, 774-75 (9th Cir. 1986).

b. ANALYSIS.

As noted, the government itself characterized its trial presentation as reflecting two conspiracies: a "Ketchikan conspiracy" and a "Sitka conspiracy[.]" ER 156, 165. That is certainly one plausible assessment of multiple conspiracies in this case which—while perhaps not dispositive on its own—should inform this Court's analysis. *See United States v. Lapier*, 796 F.3d 1090, 1097 (9th Cir. 2015) (finding the defendant's claim for relief "especially strong" in light of the prosecutor's acknowledgment "that there might be two separate conspiracies" involving the defendant).

That being said, the government's "Ketchikan vs. Sitka" dichotomy does not present the only possibility of multiple conspiracies in this case, or even the most compelling. To understand why, three additional background principles bear mention.

First, "the agreement in a conspiracy cannot be established with evidence that the defendant had an agreement with a government informer[,]" and thus there must be "sufficient evidence to find a conspiracy with someone other than government agents and informants." *United States v. Ching Tang Lo*, 447 F.3d 1212, 1225-26 (9th Cir. 2006). Under this rule, Mr. Gebregiorgis cannot have conspired with Johnson, since Johnson confessed on the stand that he informed on Mr. Gebregiorgis throughout their relationship. ER 230, 237-39, 243. The same is true for Simpson, at least as of July 13, 2016. ER 355-56, 267.

Second, co-conspirators must actually have "[a] meeting of the minds[,]" and thus "[m]ere association and activity with a conspiracy is insufficient." *United States v. Kenny*, 645 F.2d 1323, 1335 (9th Cir. 1981). This rule provides yet another reason why Mr. Gebregiorgis cannot have conspired with Johnson, since Johnson expressly testified that he never had a meeting of the minds with Mr. Gebregiorgis. ER 236. The same is true for Calhoun. *See* ER 257, 262-63, 265.[6]

[6]The same is also true for an individual in Sitka named Roland Jones, to whom the trial testimony makes a handful of oblique references. In short, Jones was identified as a person with whom Mr. Gebregiorgis stayed in Sitka prior to making Johnson's and Calhoun's acquaintance, but who locked Mr. Gebregiorgis out of the house in order to steal a "substantial amount of money and heroin and meth" from him. ER 247-50, 258-61, 307-08. In rebuttal, the government argued that Mr. Gebregiorgis was already in an "ongoing conspiracy" with Jones at the time he met Calhoun and Johnson in late June 2016. ER 189-90. That argument lacked any support in the trial record, however; the only evidence regarding Jones came from second-hand accounts that he "ripped [Mr. Gebregiorgis] off," *id.*, which, as should be plain, in no way presents a meeting of the minds.

Third, the jury cannot have rationally found that any purported conspiracy involved Davis or Tesfay, since even the police agreed at trial that they did not participate. ER 199-200.

Barring any such individuals from consideration as co-conspirators because they could not have acted as such under the identified circumstances—and even viewing the evidence in the light most favorable to the government, as required—the following two conspiracies emerge from the trial record:

(1) A conspiracy involving Mr. Gebregiorgis, Simpson, Cato, and Price Grayson to distribute heroin in Ketchikan—and possibly heroin and methamphetamine in Sitka, though that determination is a great deal murkier—from June 2016 through July 13, 2016 ("Conspiracy No. 1"); and

(2) Another conspiracy involving Mr. Gebregiorgis and Ferguson to distribute (a) heroin in Ketchikan, and (b) heroin and methamphetamine in Sitka, from August 5, 2016 through August 16, 2016 ("Conspiracy No. 2"). *See*, *e.g.*, ER 214.

Under a straightforward application of this Court's precedent, the two conspiracies just described in no way constituted parts of a cohesive whole.

To begin, the identities of the participants differed between the two. *Morse*, 785 F.2d at 774-75. Other than Mr. Gebregiorgis—the only common denominator—Conspiracy No. 1 involved (pre-informant) Simpson, Cato, and

Price Grayson, whereas Conspiracy No. 2 involved only Ferguson. As in *Lapier*, *supra*, "there was no evidence that [Ferguson] and [(pre-informant) Simpson/Cato/Price Grayson] had any agreement with each other or acted pursuant to a single conspiracy involving them both and spanning the single time period charged in the indictment[.]" *Lapier*, 796 F.3d at 1097. Nor does the trial evidence indicate that Ferguson "had [any] idea that" Mr. Gebregiorgis was previously "dealing separately with" any other conspirators. *United States v. Martin*, 4 F.3d 757, 760 (9th Cir. 1993). Mr. Gebregiorgis is further unaware of any evidence that Ferguson "benefit[ted] from the separate actions of" (pre-informant) Simpson, Cato, and Price Grayon, or vice versa. *Id.* In short, "[t]here was no evidence that the participants in either venture knew or had any reason to believe, solely by virtue of their connection to [Mr. Gebregiorgis], that their benefits were dependent upon the success of *both* operations." *Duran*, 189 F.3d at 1080 (original emphasis).

The two conspiracies also differed greatly in time, *see Morse*, 785 F.2d at 774-75: they were separated by (a) more than three weeks at the heart of the charged conspiracy period, as well as (b) Mr. Gebregiorgis's unrelated arrest in Washington, with neither conspiracy filling the charged time period on its own. *See Lapier*, 796 F.3d at 1097 n.3 ("dates may have particular importance when the charge alleges a single conspiracy but the evidence tends to show several

conspiracies during the timeframe covered by the indictment"). Further cribbing from *Lapier*:

> [Ferguson] became one of [Mr. Gebregiorgis's] [couriers] after [Mr. Gebregiorgis] was [arrested], and [Mr. Gebregiorgis's] relationship with [Ferguson] did not overlap with [his] relationship with [(pre-informant) Simpson/Cato/Price Grayson]. Once [Mr. Gebregiorgis] was [arrested], [he] had no further involvement with [(pre-informant) Simpson/Cato/Price Grayson] and [those three individuals were] no longer [] participant[s] in a conspiracy with [Mr. Gebregiorgis].

Id. at 1101. These facts also resemble *Duran*, in which the initial conspiracy ended upon the arrest of certain conspirators, and the only common figure—Montes—later commenced a second conspiracy "with a different cast of characters[.]" *Duran*, 189 F.3d at 1081 (quotation marks omitted). *See also United States v. Durades*, 607 F.2d 818, 819-20 (9th Cir. 1979) (same). *Cf. United States v. Krasn*, 614 F.2d 1229, 1236 (9th Cir. 1980) (rejecting multiple conspiracies argument where the conspiracy did not change after a break, and thus "the intervening period [was] more properly characterized as a period of suspension of activities rather than a termination resulting in two separate conspiracies") (quotation marks omitted).

In addition, the two conspiracies in this case differed in nature. *Morse*, 785 F.2d at 774-75. Although the trial evidence reflected with some specificity that Conspiracy No. 2 involved the distribution of two drugs (heroin and methamphetamine) and two cities (Ketchikan and Sitka), the evidence regarding

Conspiracy No. 1 focused much more heavily on one drug (heroin) and one city (Ketchikan), with any allegation that Conspiracy No. 1 involved methamphetamine or Sitka left essentially to speculation. In addition, Conspiracy No. 1 involved Price Grayson as a money courier, whereas no such role appears to have existed in Conspiracy No. 2. *See supra*, Section V.

Mr. Gebregiorgis agrees, as he must, that some similarities exist between Conspiracy No. 1 and Conspiracy No. 2, including that both conspiracies involved (a) Mr. Gebregiorgis, and (b) female couriers transporting controlled substances between Seattle and Southeast Alaska. This Court's precedent, however, counsels against "confusing the similar purposes of numerous separate adventures of like character, with the single purpose of one over-all scheme." *United States v. Baxter*, 492 F.2d 150, 158 (9th Cir. 1973). *Accord United States v. Ingman*, 541 F.2d 1329, 1331 (9th Cir. 1976) ("The fact that there is some interrelationship between conspiracies does not necessarily make them the same criminal enterprise.").

On these facts, the strongest characterization the government can likely muster about the events of this case is a so-called hub and spoke conspiracy, "with one central hub [Mr. Gebregiorgis] dealing with the 'spokes' the other [conspirators] in individual transactions." *Kenny*, 645 F.2d at 1334. "Without more," of course, "such a fact pattern may suggest at most a cluster of separate

conspiracies, rather than the concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose found in a single conspiracy." *Id.* at 1334-35 (quotation marks omitted). Thus the "wheel, as it were," must be "'rimmed.'" *Id.* at 1335.

For the reasons set forth above, however, there is no "rim" in this case: that is, "no evidence of any common purpose of a single enterprise linking[,]" for example, "[Ferguson] and [(pre-informant) Simpson/Cato/Price Grayson] in any collective agreement with [an] alleged rim[.]" *Lapier*, 796 F.3d at 1101 (quotation marks omitted). *Accord Duran*, 189 F.3d at 1081 ("the record is bereft of evidence that either Duran or Mora was aware of the conspiracy in which he did not participate or felt that the success of his venture was in any way dependent upon the success of the other"); *Durades*, 607 F.2d at 819-20 ("The government succeeded in proving that Lugo was the hub of the two separate conspiracies but failed to show that there was some kind of rim binding the spokes.").[7]

Based on the foregoing, this Court should find that the government presented insufficient evidence of the conspiracy it charged, and thus order a judgment of acquittal.

[7]*See also Rocha v. United States*, 288 F.2d 545, 552-53 (9th Cir. 1968) (purported co-conspirators were not "interested in" each other's activities); *Brooks v. United States*, 164 F.2d 142, 143 (9th Cir. 1947).

4. IN THE ALTERNATIVE, THE COURT SHOULD ORDER A NEW TRIAL BECAUSE THE EVIDENCE PRESENTED AT TRIAL MATERIALLY VARIED FROM THE ALLEGATIONS IN THE INDICTMENT.

Even if the Court disagrees with the foregoing sufficiency argument, it should nonetheless vacate Mr. Gebregiorgis's conviction and remand for a new trial based on a finding of fatal variance between the indictment and the proof at trial. *See, e.g.*, *United States v. Laney*, 881 F.3d 1100, 1109 (9th Cir. 2018) ("Although the issue of whether a single conspiracy has been proved is a question of the sufficiency of the evidence, the issue becomes one of variance where the evidence at trial tends to show the existence of two conspiracies rather than one ongoing conspiracy as alleged in the indictment.") (brackets and quotation marks omitted); *United States v. Adamson*, 291 F.3d 606, 616 (9th Cir. 2002) (remedy for fatal variance is new trial).

Mr. Gebregiorgis has already demonstrated at length, *supra*, that the trial evidence reflected two (or more) conspiracies rather than the single conspiracy charged. In the interest of brevity, Mr. Gebregiorgis respectfully incorporates that argument by reference rather than repeating it anew. In this posture, the only remaining question is whether the variance affected Mr. Gebregiorgis's substantial rights. *See Kenny*, 645 F.2d at 1334. It did.

In the variance context, "[a] defendant's substantial rights may be prejudiced if he is exposed to evidentiary spillover." *Duran*, 189 F.3d at 1081 (quotation

marks omitted). Of course, spillover "[e]vidence [may also be] susceptible of compartmentalization when the acts constituting the crimes that were allegedly misjoined are discrete." *Id.* at 1081-82.

Mr. Gebregiorgis's case presents a unique spillover problem because (a) Conspiracy No. 1 and Conspiracy No. 2 both involved him—thus making compartmentalization difficult—and (b) the government's evidence regarding each conspiracy, standing alone, was not strong.

As for Conspiracy No. 1, for example, neither Cato nor Price Grayson testified at trial, nor was any contraband ever seized. *See supra*, Section V(A)(2). Instead, the existence of Conspiracy No. 1 turned principally on the say-so of an admitted liar—Simpson—that he agreed to sell a "can" of heroin for Mr. Gebregiorgis before becoming an informant, coupled with some text messages from that time frame reflecting a relationship between the two. *Id.*; ER 312. In addition, nothing about Conspiracy No. 1, by itself, rationally supported the jury's finding that Mr. Gebregiorgis bore responsibility for "less than 50 grams" of methamphetamine (ER 125), because the only arguably competent evidence of methamphetamine came into evidence in connection with Conspiracy No. 2. *See supra*, Section V. In short, the foregoing evidence, without more, presented far from an overwhelming prosecution case.

The same is true for Conspiracy No. 2, in connection with which the police *did* seize contraband, but in contrast to Conspiracy No. 1, law enforcement substantially lacked incriminating admissions from Mr. Gebregiorgis similar to the text messages and phone calls entered into evidence through Simpson. *See supra*, Section V(A)(3). Accordingly, proof of Mr. Gebregiorgis's involvement in Conspiracy No. 2 turned heavily on the say-so of a drab and untrustworthy parade of addicts and cooperating witnesses such as Johnson, Calhoun, and Ferguson. *Id.* Here again, the evidence regarding this conspiracy, without more, did not present an overwhelming case.

Taken together, by contrast, Conspiracy No. 1 and Conspiracy No. 2 added up to a far more compelling presentation: in concert, they presented a more cohesive narrative in which the events of each conspiracy, respectively, corroborated the other, thus making each tale more believable overall. In other words, even though the grand jury charged a continuing conspiracy from June 1 through August 16, 2016, "the proof disclosed two conspiracies in [that time frame] which the indictment had lumped together[,] thus prejudicing [Mr. Gebregiorgis] by allowing admission of evidence not otherwise admissible" in a trial for either. *Arnold v. United States*, 336 F.2d 347, 353 (9th Cir. 1964), *citing United States v. Russano*, 257 F.2d 712 (2d Cir. 1958). Moreover, because the multiple conspiracies instruction required a not guilty verdict in the event the jury

found "that the conspiracy charged did not exist," ER 146, the "guilty verdict[] necessarily mean[s] that the jury convicted [Mr. Gebregiorgis] of the larger conspiracy[] for which there was insufficient admissible evidence[,]" thus rendering the variance material. *United States v. Castaneda*, 16 F.3d 1504, 1509 n.2 (9th Cir. 1994).

This Court should vacate Mr. Gebregiorgis's conviction and remand for a new trial.

B. THE DISTRICT COURT COMMITTED REVERSIBLE STRUCTURAL ERROR BY GRANTING DEFENSE COUNSEL'S REQUESTS FOR TRIAL CONTINUANCES OVER MR. GEBREGIORGIS'S OBJECTION.

1. FACTUAL BACKGROUND.

As noted *supra*, local police arrested Mr. Gebregiorgis on August 13, 2016. ER 214.

After an intervening period involving state court proceedings, the federal grand jury returned its indictment on February 22, 2017 (ER 385-87), and Mr. Gebregiorgis made his initial appearance—in custody—on March 1, 2017 (CR 6). At that time, trial was set for May 8, 2017. CR 7.

On March 22, 2017, defense counsel moved to continue Mr. Gebregiorgis's trial to September 2017, arguing that (1) he had limited communication with Mr. Gebregiorgis, and (2) he required additional time to prepare for "motions practice and trial." ER 380-84. The next day, the district court rejected counsel's filing on

the ground that it erroneously omitted a required recital regarding "Speedy Trial Act implications." CR 17.

On April 4, 2017, counsel re-filed his motion, this time asking for a June 2017 trial date because Mr. Gebregiorgis did "not wish to wait until September of 2017 to try [the] case." ER 376-83. In all other respects, counsel provided no reasons for his request. *Id.*

At a hearing held April 21, 2017, lead defense counsel did not personally appear, and the district court opined to stand-in counsel that the continuance motion set forth "absolutely no reason why [the court] should move this trial from the May date." ER 370-71. Mr. Gebregiorgis agreed, and added unequivocally: "I want to keep the same trial." ER 372; *accord* ER 375 ("I do not want to move my trial."). In light of (1) the conflict between Mr. Gebregiorgis and counsel, and (2) lead counsel's absence from the hearing, the district court deferred ruling on the motion until a further hearing scheduled for April 25, 2017. ER 373-74; CR 27-28.

At the April 25 hearing, lead counsel acknowledged that Mr. Gebregiorgis wanted to "press forward" with trial "right away" because he had been languishing in continuous custody since his state court proceedings, but he gave two reasons for the requested continuance: (1) he was going to be out of the district for his daughters' college graduations, and (2) he had filed a motion to suppress that still

remained pending decision. ER 81-83; CR 18.[8] Mr. Gebregiorgis, by contrast, noted that he had already been in custody for approximately nine months, and that his mother was dying. ER 87-88. The district court recognized Mr. Gebregiorgis's "frustration," but it nonetheless continued trial to July 24, 2017—with findings under the Speedy Trial Act—opining that counsel's request for time to resolve suppression was "reasonable." ER 84-90.

On June 26, 2017, counsel moved to withdraw from this case, based principally on a claimed disagreement with Mr. Gebregiorgis regarding Mr. Gebregiorgis's purported request to file another pretrial motion without "waiv[ing] the necessary time." ER 364-68. At a hearing held July 5, 2017, counsel clarified that with additional time, he would file further motions to suppress on Mr. Gebregiorgis's behalf. ER 405-08. Mr. Gebregiorgis, by contrast, clarified that he didn't "have any problem with" counsel, and instead simply "want[ed] to keep [his] court date." ER 411; *accord* ER 410 ("I'm ready to go to trial."). Noting that as of that hearing, the motions deadline had already passed, the district court opined that the case was in "trial mode[,]" and it appeared settled that the case was therefore headed to trial without (1) relieving defense counsel or (2) any further pretrial motion practice. ER 409, 412; *see also* CR 39.

[8]The motion to suppress alleged, in sum, intentional and/or reckless misrepresentations and omissions in a warrant affidavit. CR 19. A magistrate judge later granted that motion on July 28, 2017. CR 44.

Curiously, the district court *sua sponte* issued an order after the hearing directing defense counsel to explain what additional motions he might file if given the time. CR 38. Counsel complied with the court's order, and the court set a hearing on the matter. CR 41-42.

At that hearing, defense counsel considerably ramped up his rhetoric regarding the perceived import of additional pretrial motions—despite the fact that he had let the motions deadline pass—now claiming that trial would be a "slaughter" for Mr. Gebregiorgis without them. ER 68; *accord* ER 69, 71-72, 78 ("there is certainly a need for these motions to be done if Mr. Gebregiorgis is even going to have a prayer of winning"). Accordingly, counsel requested a trial continuance. ER 73.

Mr. Gebregiorgis, by contrast, was adamant that (1) there had been plenty of time to file the motions at issue, and (2) he was "ready to go to trial." ER 70, 73-74, 77-79. Indeed, Mr. Gebregiorgis all but begged counsel and the district court not to move his trial. ER 78 ("But I do not want to change my trial date. I'm ready to go to trial. Please don't change my trial date, Your Honor. Rex, please don't do that to me.").

After expressing concern about the potential for an ineffective assistance of counsel claim down the road if no further motions were filed, the district court

made findings under the Speedy Trial Act and continued Mr. Gebregiorgis's trial by four months, to November 2017. ER 70, 73-77, 79; CR 43.

2. STANDARD OF REVIEW.

This Court reviews *de novo* whether a defendant has been denied his Sixth Amendment right to the assistance of counsel. *See United States v. Read*, 918 F.3d 712, 719 (9th Cir. 2019).

3. ANALYSIS.

In the proceedings below, government counsel opined that it was "not overly clear to [him] what the law is with regard to defendant's waiver of filing pretrial motions and proceeding to trial." ER 75. If the law was unclear at that time, it is no longer.

In *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), the Supreme Court clarified the line between (1) litigation decisions for which defense counsel is responsible, and (2) decisions that only the defendant may personally make. As the Court noted: "[t]o gain assistance, a defendant need not surrender control entirely to counsel." *Id.* at 1508.

On the one hand, trial management decisions are the "lawyer's province[,]" including, for example, "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence." *Id.* (quotation marks omitted). On the other hand, "[a]utonomy to decide . . . the

objective of the defense" is "reserved for the client[,]" including such matters as "whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." *Id.* Fundamentally, the Supreme Court described the distinction as follows: the defendant's decisions "are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*." *Id.* (original emphases). Applying these principles, the Court held that structural error obtains if defense counsel admits guilt "over the client's express objection[.]" *Id.* at 1511-12.

In *Read*, this Court applied *McCoy* to conclude that defense counsel may not pursue an insanity defense over a client's objection. *Read*, 918 F.3d at 719. In short, the outcome in *Read* flowed from *McCoy*'s emphasis on "the defendant's autonomy to determine the 'objectives' of a defense[.]" *Id.* at 720.

Under *McCoy* and *Read*, this Court should hold that Mr. Gebregiorgis's speedy trial demand constituted a fundamental *objective* of the defense—which should have been left to him—rather than a tactical decision for counsel. Mr. Gebregiorgis is unaware of any controlling precedent squarely deciding this issue, [9]

[9]The Supreme Court has held, for instance, that under the Interstate Agreement on Detainers ("IAD"), defense counsel may waive time limits without "express assent from the defendant himself[.]" *New York v. Hill*, 528 U.S. 110, 114-18 (2000). Even aside from the fact that *Hill* addressed the IAD—which has no application here—*Hill* also did not involve a timely and unambiguous objection by the defendant. *Id.* at 112-13; *Gonzalez v. United States*, 553 U.S. 242, 253 (2008)

but his insistence on the prompt adjudication of his guilt or innocence—which arose, in significant part, out of his (a) lengthy pretrial confinement, and (b) desire to reunite with his family—plainly presented a fundamental objective of his defense rather than a trial management issue. *See Barker v. Wingo*, 407 U.S. 514, 532 (1972) (the speedy trial right is designed, *inter alia*, to "prevent oppressive pretrial incarceration" and "minimize anxiety and concern of the accused").

It may well be that some continuances—particularly without any objection from the defendant—could be characterized as mere "[s]cheduling matters[,]" and that if a continuance does touch on tactical considerations, counsel may indeed be in the best "position to assess the benefit or detriment of the delay to the defendant's case." *Hill*, 528 U.S. at 115. The same, however, was true in *McCoy*, which expressly acknowledged that in a capital case "[c]ounsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty[.]" *McCoy*, 138 S. Ct. at 1509. It was also true in *Read*, where the district court wrestled with

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("We do not have before us, and we do not address, an instance where the attorney states consent but the party by express and timely objection seeks to override his or her counsel."). *See also McCoy*, 138 S. Ct. at 1507 (stressing "the defendant's intransigent and unambiguous objection"); *Read*, 918 F.3d at 720 ("*McCoy*'s emphasis on the defendant's autonomy strongly suggests that counsel cannot impose an insanity defense *on a non-consenting defendant*.") (emphases added). As noted above, Mr. Gebregiorgis repeatedly and unambiguously objected to defense counsel's continuance requests. *See, e.g.*, *United States v. Hall*, 181 F.3d 1057, 1060-61 (9th Cir. 1999) (defendant may override defense counsel to assert rights under the Speedy Trial Act).

"whether to permit a defendant, competent and allowed self-representation but clearly mentally ill, to eschew a plausible defense of insanity in favor of one based in delusion and certain to fail." *Read*, 918 F.3d at 719. Under *McCoy* and *Read*, it thus does not carry the day that the defendant's exercise of his fundamental rights may *also* implicate strategic matters; nearly every litigation decision will.

There should also be no debate that the right to a speedy trial is a fundamental constitutional right. *See* U.S. Const., amend. VI; *Klopfer v. State of N.C.*, 386 U.S. 213, 223 (1967) ("We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English law heritage."). In addition, the length of the delay in Mr. Gebregiorgis's case was significant enough to trigger his right to speedy trial—including, even, a presumption of prejudice arising out of the delay. *See United States v. Gregory*, 322 F.3d 1157, 1161-62 & n.3 (9th Cir. 2003).

Where, as here, the accused unambiguously declares—both (i) as an objective of his defense, and (ii) consistent with the most basic purposes of the speedy trial right—that he insists upon a prompt adjudication of his criminal culpability, neither (a) defense counsel's vacation schedule, nor (b) the district court's desire to insulate the record from ineffective assistance of counsel, nor (c) counsel's belated expression of interest in filing untimely motions, should have

been permitted to override that request. The Court should find structural error, vacate Mr. Gebregiorgis's convictions, and remand for a new trial.

C. THE DISTRICT COURT COMMITTED THREE SERIOUS SENTENCING ERRORS, WARRANTING VACATUR OF MR. GEBREGIORGIS'S SENTENCE AND REMAND FOR RESENTENCING.

1. FACTUAL BACKGROUND.

Mr. Gebregiorgis appeared for sentencing on June 1, 2018. CR 139. In his sentencing memorandum, he recommended the statutory minimum of 60 months imprisonment. ER 93. In support of that request, he argued, among other things, that (1) the PSR erroneously awarded him a criminal history point for a 2009 misdemeanor trespass prosecution (PSR ¶ 50); (2) without the erroneous point, he fell into a "low" Criminal History Category ("CHC") III; (3) based on the remainder of his criminal history, CHC III "significantly over-represent[ed] the seriousness" of his record; and thus (4) the district court should apply CHC II instead. ER 95-96. The government, by contrast, recommended application of CHC III and, ultimately, a custodial sentence of 144 months. CR 130.

At sentencing, the district court credited Mr. Gebregiorgis's contention that the 2009 trespass case did not properly score a CHC point. ER 10. The court did not, by contrast, even acknowledge—let alone rule on—Mr. Gebregiorgis's contention that without the erroneous point, CHC III improperly over-represented

his criminal history. ER 10-12. At CHC III, the district court calculated an advisory guidelines range of 121-151 months. ER 12.

Within that range, the district court settled on a sentence of 121 months. ER 42-43. In explaining its rationale—including its rejection of Mr. Gebregiorgis's sentencing request—the court made five main points.

First, it expressed dismay that Mr. Gebregiorgis stood on his right to a jury trial in the face of purportedly overwhelming evidence, a point the court articulated, in full, as follows:

> I do think that this is not a case in which the defendant was charged, had an opportunity to review the evidence, and then said, 'Oh, you know, gosh, I need to turn my life around. I'm going to enter into some sort of agreement or plea.' No. What the defendant has done from Day 1 is deny his involvement, in which the evidence was overwhelming that he was involved in this conduct. So it's not a situation in which the defendant has had some epiphany in which he has said, 'Oh, I need to change the way I'm living my life and I need to make amends and I need to turn my life around.' He's had the exact opposite approach.
>
> And that is absolutely his right under the Constitution to make the Government prove its case against him, but it also underscores a lack of awareness and a lack of contrition for the conduct in which he was involved.

ER 40-41.

Second, the court expressed concern about evidence that Mr. Gebregiorgis became involved with drugs while in pretrial custody. ER 41-42.

Third, the court was troubled by a 1996 juvenile incident when—at age 14—Mr. Gebregiorgis displayed a firearm and made threats during a fight with a classmate. ER 42, *referring to* PSR ¶ 40.

Fourth, the court accused Mr. Gebregiorgis of committing "continued domestic violence." ER 42.

Fifth, the court found that Mr. Gebregiorgis had, in the past, "failed on supervised release to follow the rules." ER 42.

Based on these considerations, the court imposed a custodial sentence more than double the term Mr. Gebregiorgis requested. ER 1-7.

2. STANDARD OF REVIEW.

This Court reviews sentences for procedural and substantive reasonableness. *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (*en banc*). Mr. Gebregiorgis acknowledges this Court's precedent applying plain error review where, as here, a defendant did not object below to the specific errors identified on appeal. *See, e.g.*, *United States v. Rangel*, 697 F.3d 795, 800-01 (9th Cir. 2012) (non-constitutional errors); *United States v. Ameline*, 409 F.3d 1073, 1078 (9th Cir. 2005) (*en banc*) (constitutional errors). Plain error is: "(1) error, (2) that is plain, and (3) that affects substantial rights." *Johnson v. United States*, 520 U.S. 461, 467 (1997) (internal brackets and quotation marks omitted). "If all three conditions are met, an appellate court may then exercise its discretion to notice a

forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id*. (internal brackets and quotation marks omitted).

Where, however, as here, a defendant complies with Fed. R. Crim. P. 51(b) by "informing the court . . . of the action [he] wishes the court to take"—*i.e.*, by requesting a sentence different than the one imposed—the Court should find the claims of error preserved and thus review for abuse of discretion. *See Carty*, 520 F.3d at 993. *See also United States v. Dale*, 498 F.3d 604, 610 & n.5 (7th Cir. 2007) ("failure on the part of Mr. Dale to object to his sentence on the specific ground that it was unreasonable did not result in forfeiture of the argument and plain error does not apply").

3. ANALYSIS.

a. THE DISTRICT COURT ERRONEOUSLY PUNISHED MR. GEBREGIORGIS FOR EXERCISING HIS RIGHT TO TRIAL.

To begin, the district court improperly penalized Mr. Gebregiorgis for exercising his constitutional right to trial by jury.

It is impermissible for a sentencing judge to punish a defendant "for standing trial," because "[i]f there was such a use of the sentencing power, the constitutional right to trial would be impaired." *United States v. Stockwell*, 472 F.2d 1186, 1187 (9th Cir. 1973). In fact, even the mere "inference" or "appearance" of such wrongful punishment, if unrebutted by the record, warrants

vacatur and remand for resentencing. *Id.* at 1187-88. *Accord United States v. Medina-Cervantes*, 690 F.2d 715, 716 (9th Cir. 1982) (remanding for resentencing upon finding an unrebutted "inference" that the defendant "was punished more severely because of his assertion of the right to trial by jury[,]" so as "to avoid the chilling effect upon the exercise of the right to trial presented by even the appearance of such a practice") (quotation marks omitted).

The sentencing transcript in this case gives rise—at a minimum—to an appearance that the district court punished Mr. Gebregiorgis more harshly because he stood on his constitutional right to a trial. Even though Mr. Gebregiorgis's decision to stand trial meant that he had already forfeited acceptance of responsibility points under the Sentencing Guidelines (PSR ¶ 34),[10] the district court nonetheless could not contain its displeasure with Mr. Gebregiorgis's temerity to convene a jury trial in the face of purportedly "overwhelming" evidence. ER 41. Even while paying lip service to Mr. Gebregiorgis's right to "make the Government prove its case against him"—which is all the trial meant

[10]There is one caveat to this assertion: because Mr. Gebregiorgis presented a multiple conspiracies defense at trial—through which he conceded his involvement in drugs—the inapplicability of acceptance points was not necessarily a foregone conclusion. *See United States v. Daychild*, 357 F.3d 1082, 1100-01 (9th Cir. 2004) (defendants may still qualify for acceptance of responsibility if they present a trial defense that "admit[s] . . . conduct that would otherwise be unlawful"). Nonetheless, Mr. Gebregiorgis did not litigate acceptance points below (ER 93-109), nor does he do so now.

from a constitutional perspective—the district court expressly rejected Mr. Gebregiorgis's sentencing request, at least in part, because he did not (i) bow to the strength of the government's case, (ii) "'enter into some sort of agreement or plea'" as a result, and (iii) in so doing, express an acceptable level of "contrition for the conduct in which he was involved." ER 40-41.

Most directly, the transcript leaves no room for doubt that the district court imposed a higher sentence than it otherwise would have simply because it was upset with Mr. Gebregiorgis for exercising his constitutional right to a jury trial. At a bare minimum, the record gives rise to an "appearance" of vindictiveness sufficient to satisfy the first two prongs of the plain error test. *United States v. Olano*, 507 U.S. 725, 734 (1993) (plain errors are "clear" or "obvious") (quotation marks omitted).

b. THE DISTRICT COURT INACCURATELY ACCUSED MR. GEBREGIORGIS OF DENYING HIS INVOLVEMENT IN HIS CONDUCT OF CONVICTION.

This Court should also reject the district court's inaccurate statement that Mr. Gebregiorgis failed to demonstrate "contrition for the conduct in which he was involved" because, in the court's view, "[w]hat [Mr. Gebregiorgis] has done from Day 1 is deny his involvement, in which the evidence was overwhelming that he was involved in this conduct." ER 41.

A sentence is procedurally unreasonable if the district court chooses "a sentence based on clearly erroneous facts[.]" *Carty*, 520 F.3d at 993. From a constitutional standpoint, sentencing errors also violate due process if the district court relies on "improper, inaccurate, or mistaken information[.]" *United States v. Borrero-Isaza*, 887 F.2d 1349, 1352 (9th Cir. 1989).

Such is the case here, where the district court based Mr. Gebregiorgis's sentence, at least in part, on an erroneous determination that Mr. Gebregiorgis denied involvement in his conduct of conviction. In fact, Mr. Gebregiorgis candidly conceded that he had been caught "dealing drugs" in Southeast Alaska, and thus that "[i]f the charge was distribution of drugs," there may have been no trial at all. ER 184. What Mr. Gebregiorgis disputed, by contrast, was that the government accurately characterized his unlawful conduct in the charging instrument, and he thus stood on his constitutional right to be tried on the charge returned by the grand jury. ER 175 ("That may not sit well with individuals. This is not a technicality in the law. This is the law. . . . By [the government's] own statement, there are, quote/unquote, multiple conspiracies, [and] I submit to you, a failure to establish the conspiracy charged.").

By ignoring the multiple conspiracies defense that Mr. Gebregiorgis actually presented at trial, the district court labored under an unduly aggravated assessment of him at sentencing. Simply put, Mr. Gebregiorgis did not "deny his involvement

. . . in this conduct" as the district court said. ER 41. Even under the plain error standard, this Court should find error. *Olano*, 507 U.S. at 734.

c. THE DISTRICT COURT FAILED TO ADDRESS MR. GEBREGIORGIS'S NONFRIVOLOUS REQUEST TO REJECT CHC III.

Last, the district court erroneously failed to address Mr. Gegregiorgis's contention that CHC III overstated his criminal history. ER 96. It constitutes procedural error for a district court to ignore "nonfrivolous argument[s] tethered to a relevant [18 U.S.C.] § 3553(a) factor in support of a requested sentence[.]" *Carty*, 520 F.3d at 992-93. *Accord United States v. Trujillo*, 713 F.3d 1003, 1009-11 (9th Cir. 2013).

Here, Mr. Gebregiorgis unambiguously asked the district court not to apply CHC III. ER 96. His request was tethered to section 3553(a)—*i.e.*, sections 3553(a)(4) and 3553(a)(5), which direct sentencing courts to consider the Sentencing Guidelines and any pertinent policy statements. *See* 18 U.S.C. § 3553(a)(4)-(5). His request was also nonfrivolous: as Mr. Gebregiorgis noted, his criminal history score fell into a "low" CHC III, and the prior convictions that so qualified him consisted entirely of three misdemeanor restraining order violations dating back as far as 2010. PSR ¶¶ 51-53. The Guidelines also expressly authorized Mr. Gebregiorgis's motion, meaning he trod upon solid legal ground. *See* U.S.S.G. § 4A1.3(b) (2016 ed.).

The district court may or may not have ultimately agreed with Mr. Gebregiorgis's request, but the answer to that question remains unknown because the court declined to address it. *See Trujillo*, 713 F.3d at 1010 ("Regardless of the ultimate force of Trujillo's arguments, they are not frivolous."). Under a straightforward application of this Court's precedent, the Court should find, at least, plain error. *Carty*, 520 F.3d at 992-93; *Olano*, 507 U.S. at 734.

d. THE DISTRICT COURT'S ERRORS AFFECTED THE LENGTH OF MR. GEBREGIORGIS'S SENTENCE, THUS WARRANTING VACATUR AND REMAND.

Upon finding sentencing error, this Court will vacate and remand unless it concludes "the error was harmless, i.e., that the error did not affect the district court's selection of the sentence imposed." *United States v. Cruz-Gramajo*, 570 F.3d 1162, 1167 (9th Cir. 2009) (quotation marks omitted).

Even on plain error review, sentencing errors affect a defendant's substantial rights if there is "a reasonable probability that he would have received a different sentence if the district court had not erred." *United States v. Joseph*, 716 F.3d 1273, 1280 (9th Cir. 2013) (quotation marks and brackets omitted). "A reasonable probability is, of course, less than a certainty, or even a likelihood." *Id.* (quotation marks omitted). This Court has "held that when a plain error may have led to a sentence that was *one month* longer than necessary, even within the Sentencing Guidelines, that error affects substantial rights." *Id.* (emphases added, quotation

marks omitted); *see also id.* at 1281 ("[O]ur role is not to hypothesize about what the district court *would* have done. Rather, where, as here, there is a *possibility* that the district court would have exercised its discretion and arrived at a lower overall sentence, the third prong of the plain error inquiry is satisfied.") (original emphases). The Court has also "regularly deemed the fourth prong of the plain error standard to have been satisfied where, as here, the sentencing court" commits an error "that may have increased the length of a defendant's sentence." *Id.* at 1281 (quotation marks omitted).

The errors set forth above readily satisfy the foregoing standards, whether alone or in combination. Tellingly, the district court's constitutional violations—(1) punishing Mr. Gebregiorgis for standing trial, and (2) sentencing him based on erroneous facts—were among the court's first remarks in explaining its sentencing decision, thus demonstrating their primacy in its rationale. ER 40-42. Moreover, the court's stated concerns about Mr. Gebregiorgis's criminal history (ER 39-42) dovetail neatly—for purposes of a harmless error analysis—with its failure to address Mr. Gebregiorgis's contention that his CHC was overstated: had the court duly grappled with Mr. Gebregiorgis's argument, it may well have reconsidered its views regarding (a) Mr. Gebregiorgis's prior conduct, and (b) what, if anything, his past indicated about his future.

Even under the plain error standard, this Court does not hesitate to vacate and remand for resentencing where, as here, erroneous sentencing factors played a part in a broader sentencing matrix. *See, e.g.*, *United States v. Tapia*, 665 F.3d 1059, 1061-63 (9th Cir. 2011) (erroneous consideration of defendant's correctional and rehabilitative needs accompanied other sentencing factors and satisfied the third and fourth prongs of the plain error test). Among other reasons, that is because sentencing errors are comparatively easy, and low-cost, to correct. *United States v. Castillo-Casiano*, 198 F.3d 787, 792 (9th Cir. 1999).

For these reasons, this Court should vacate Mr. Gebregiorgis's sentence and remand for resentencing.

D. THE DISTRICT COURT ERRONEOUSLY IMPOSED SEVEN SPECIAL CONDITIONS OF SUPERVISED RELEASE.

1. FACTUAL BACKGROUND.

As noted, the district court imposed a custodial sentence of 121 months. ER 42-43. In addition, the court imposed (i) a $100 special assessment, and (ii) five years of supervised release with unidentified "special conditions that are included in the judgment issued by the Court." ER 43. In its written judgment, the district court then inserted seven such conditions, including (a) immigration conditions, (b) a financial disclosure condition, (c) a search condition, (d) a drug testing and treatment condition, and (e) a condition prohibiting Mr. Gebregiorgis from consuming alcohol. ER 1-7.

2. STANDARD OF REVIEW.

Although defense counsel did not object to the district court's special conditions, plain error review does not apply because the district court "afforded him no opportunity to do so." *United States v. Mancinas-Flores*, 588 F.3d 677, 686 (9th Cir. 2009). Indeed, the district court only obliquely referenced unspecified "special conditions" as it was already imposing sentence, and it did not specifically identify the conditions until later, in its written judgment. ER 43, 1-7. The Federal Rules of Criminal Procedure "do not require a defendant to force an objection or exception into the record." *Mancinas-Flores*, 558 F.3d at 686. "Rather, exceptions are unnecessary, and an objection is required only if the court affords a party the opportunity to make one." *Id.* Because the district court's ruling was a foregone conclusion, plain error review does not apply, and this Court should instead review "*de novo* the legality of [Mr. Gebregiorgis's] sentence." *United States v. Napier*, 463 F.3d 1040, 1042 (9th Cir. 2006).

3. ANALYSIS.

The district court's treatment of the special conditions suffers from a significant defect: it violated Mr. Gebregiorgis's "right under the Sixth Amendment and the Federal Rules of Criminal Procedure to be present at his sentencing." *Id.* A district court errs when it "when it include[s] in the written judgment nonstandard conditions of supervised release without first announcing

those conditions as part of [the] oral sentence." *Id.* That is because "[t]he actual imposition of a sentence occurs at the oral sentencing, not when the written judgment later issues." *Id.* "By adding . . . nonstandard conditions of supervised release to [Mr. Gebregiorgis's] sentence after the hearing, the district court denied [Mr. Gebregiorgis] the right to be present for the imposition of this part of his sentence." *Id.* at 1043. For substantially the same reasons, the district court committed structural error by depriving Mr. Gebregiorgis of his Sixth Amendment right to counsel at sentencing. *See United States v. Yamashiro*, 788 F.3d 1231, 1234-36 (9th Cir. 2015) (violation of right to counsel at sentencing constitutes structural error).

Where, as here, the district court erroneously "state[s] that the written judgment [will] contain other [unspecified] conditions[,]" the appropriate remedy is to "vacate the sentence and remand for resentencing." *Napier*, 463 F.3d at 1043-44. The Court should do so in this instance.

VIII. CONCLUSION

For the reasons set forth above, this Court should order a judgment of acquittal. In the alternative, the Court should vacate Mr. Gebregiorgis's conviction and remand for a new trial. At a minimum, the Court should vacate Mr. Gebregiorgis's sentence and remand for resentencing.

Respectfully submitted,

DATED: June 6, 2019

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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